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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL HERMAN, an individual,

Plaintiff,

vs.

NORTH AMERICAN
COMMUNICATIONS, INC. a
Pennsylvania corporation; NICHOLAS
ROBINSON, an individual; ROBERT
HERMAN, an individual,

Defendant.

Case No. 17 CV 1769 BEN NLS

**SECOND AMENDED
COMPLAINT FOR DAMAGES FOR
BREACH OF WRITTEN CONTRACT,
QUANTUM MERUIT, BAD FAITH,
UNJUST ENRICHMENT, VIOLATION
OF THE UNIFORM FRAUDULENT
TRANSFER ACT, ("UFTA"), FRAUD &
MISREPRESENTATION, NEGLIGENCE
MISREPRESENTATION,
FRAUDULENT CONVEYANCE,
TRANSFER TO AVOID CREDITORS
AND DECLARATORY JUDGMENT**

DEMAND FOR JURY TRIAL

ELECTRONICALLY FILED

Plaintiff MICHAEL HERMAN, for causes of action against Defendants and each of
them, alleges as follows:

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JURISDICTIONAL ALLEGATIONS

1
2
3 1. Plaintiff MICHAEL HERMAN, (“Plaintiff” or “Michael”) is an individual
4 residing in the City and County of San Diego, state of California, within the jurisdiction of this
5 Court.

6
7 2. Defendant NICHOLAS ROBINSON (“Robinson”) is an individual residing in the
8 state of New York.

9
10 3. Defendant ROBERT HERMAN (“R. Herman”) is an individual residing in the
11 state of Texas.

12 4. Defendant NORTH AMERICAN COMMUNICATIONS, INC., (“Defendant” or
13 “NAC”) is a corporation organized and existing under the laws of the Commonwealth of
14 Pennsylvania and conducting, and having conducted, business within the jurisdiction of this
15 Court.

16
17 5. On information and belief, certain of the acts, events, breaches, wrongs and
18 defaults occurred within the jurisdiction of this Court.

19
20 6. The jurisdiction of this Court over the subject matter of this action is predicated on
21 28 USC §1332. The amount in controversy exceeds \$75,000.00 exclusive of interest and costs.

22
23 7. Plaintiff is informed and believes and thereupon alleges that, at all times herein
24 alleged, defendants, and each of them, were acting as the agents, servants, employees,
25 employers, conspirators, venturers, partners and/or subsidiaries of each other, and in doing the
26 wrongful acts herein alleged, were acting within the course and scope of such agency,
27 relationship, arrangement and/or employment.
28

GENERAL ALLEGATIONS

8. On or about June 21, 2013, Plaintiff and Defendant entered upon that certain *Retirement Agreement* whereby in consideration of Plaintiff's resignation as a member of the board of directors of NAC, NAC would in turn pay Plaintiff certain retirement benefits including bi-monthly installments of sixty-five thousand dollars (\$65,000) commencing upon Plaintiff's resignation date of June 21, 2013 and continuing for a period of ten (10) years thereafter ("Retirement Benefits"). A copy of the Agreement together with Plaintiff's resignation from the NAC board of directors are attached to this Complaint marked Exhibits "A" and "B" respectively.

9. From and following June 21, 2013, Plaintiff received payments from NAC totaling one million seven hundred thirteen thousand dollars (\$1,713,000).

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

10. Plaintiff incorporates by reference each and every allegation contained in Paragraphs 1 through 9 as though fully set forth herein

11. From and following the payment of the sums detailed in Paragraph 9 above, payments of the Retirement Benefits ceased and Defendant has made no further payment to Plaintiff, although demand has been made therefore, and there is currently due, owing and unpaid, the remaining balance of the Retirement Benefits totaling thirteen million, eight hundred eighty-seven thousand dollars, (\$13,887,000). Plaintiff's demand to NAC for payment of the

1 Retirement Benefits is attached hereto and marked Exhibit "C" and incorporated herein by
2 reference.

3
4 12. Plaintiff has done all things on his part to be done in accordance with the
5 Retirement Agreement, including tendering his resignation from the board of directors of NAC
6 as evidenced by Exhibit "B" hereof, excepting for those matters, that Plaintiff was and has been
7 prevented from undertaking and performing due to Defendant's wrongful conduct.

8
9 13. Defendant NAC's failure and refusal to pay the sums remaining owed pursuant to
10 the Retirement Agreement, was wrongful, without excuse, or justification and constituted a
11 breach thereof.

12
13 14. The Release provisions of the Retirement Agreement further provides for an award
14 of attorneys' fees and costs incurred by NAC and defending against claims asserted by Plaintiff.
15 In accordance with the reciprocal entitlement and enforcement provisions of California Civil
16 Code § 1717, Plaintiff has incurred attorneys' fees and costs in prosecuting this instant action
17 and therefore is entitled to his attorneys' fees and costs in addition to the judgments delineated
18 in the Prayer hereinbelow.

19
20 15. As a direct and proximate result of Defendant's breach of the Retirement
21 Agreement, Plaintiff has sustained damage and injury all to his loss in the sum \$13,887,000.

22
23 **SECOND CAUSE OF ACTION**

24 **QUANTUM MERUIT**

25
26 16. Plaintiff incorporates by reference each and every allegation contained in
27 Paragraphs 1 through 15 as though fully set forth herein.

28 ///

1 17. Plaintiff is informed and believes and thereupon alleges that during the last forty
2 (40) years, Plaintiff formed, operated, developed, and built NAC into an influential, dynamic,
3 profitable and well-run organization with offices and facilities located throughout the United
4 States and Mexico, including within two jurisdictions of this Court. During those years,
5 Plaintiff invested his time, effort, labor, skills, influence, trust and opportunities (“Investments”)
6 to and for the benefit of NAC, and without such Investments, NAC would not be the successful
7 and profitable entity that it was at the time of the Retirement Agreement through the present.
8

9
10 18. Plaintiff’s Retirement Benefits as provided in the Retirement Agreement, were in
11 compensation and consideration for his Investments in NAC and NAC was enriched by such
12 Investments. However, Plaintiff was denied the compensation bargained for and to be received
13 by the terms of the Retirement Agreement.
14

15 19. Plaintiff is therefore entitled to compensation in the form of an award of *quantum*
16 *meruit* for his Investments in NAC in the sum of \$13,887,000.
17

18 **THIRD CAUSE OF ACTION**

19 **BAD FAITH**

20 20. Plaintiff incorporates by reference each and every allegation contained in
21 Paragraphs 1 through 19 as though fully set forth herein.
22

23 21. The Retirement Agreement included an implied covenant of good faith and fair
24 dealing, which operated to prohibit NAC from undertaking any act or refusing to perform an act
25 which would deny Michael the fruits and benefits reasonably anticipated from the Retirement
26 Agreement.
27

28 ///

1 22. At all times herein mentioned, Plaintiff has done all the acts required by the
2 Retirement Agreement including, without limitation, resigning as a member of the board of
3 directors of NAC, and otherwise observing the restrictive covenants of the Retirement
4 Agreement on his part required.
5

6 23. Defendants' failure and refusal to make payments under the Retirement
7 Agreement was a violation of the covenant of good faith and fair dealing on their part to be
8 observed.
9

10 24. Plaintiff is informed and believes and thereupon alleges that Defendant has
11 repudiated and denied any obligation on their part to pay the balance owed under the
12 Agreement, or any sum whatsoever.
13

14 25. Plaintiff is informed and believes and thereupon alleges that at all times herein
15 mentioned, including at the present, Defendant possessed and possesses adequate funds to pay
16 all or a substantial portion of the sums owed Plaintiff but have, instead, diverted those funds to
17 enrich Defendants.
18

19 26. As a direct and proximate result of Defendant's bad faith conduct including
20 denying a subsisting obligation to pay what is owed under the Retirement Agreement, Plaintiff
21 has sustained damages equal to the remaining sum owed including future scheduled payments,
22 and such other and further losses proven at time of trial.
23

24 **FOURTH CAUSE OF ACTION**

25 **FRAUDULENT AND VOIDABLE TRANSFER**
26

27 27. Plaintiff incorporates by reference each and every allegation contained in
28 Paragraphs 1 through 26 as though fully set forth herein.

1 28. Plaintiff is informed and believes that at all times herein mentioned, excepting for
2 the facts set forth in this cause of action, Defendant NAC was solvent in that its assets exceeded
3 NAC's debts and NAC was generally able to meet its debts as they became due.
4

5 29. On or about 2016 Defendants Robinson and R. Herman, and each of them,
6 transferred, concealed and/or removed from NAC, sums exceeding \$2,000,000 and converted
7 those sums to their own and personal use and benefit, to the exclusion of Plaintiff; NAC
8 intended to conceal and cloak those sums as assets of NAC which otherwise would have been
9 available to partially satisfy, service and pay the benefits under the Retirement Agreement owed
10 to Plaintiff.
11

12 30. Such a transfer was in violation of *Uniform Fraudulent Transfer Act*, California
13 Civil Code §§ 3439 – 3439.12, as well as the Pennsylvania *Uniform Fraudulent Transfer Act*, 12
14 Pa.C.S.A. § 5101 et seq.
15

16 31. Plaintiff is informed and believes that as a “creditor” having a claim and
17 possessing a debt, which debt is secured by a lien as defined in California Civil Code § 3439 (b-
18 f).
19

20 32. Plaintiff is informed and believes that the transfer of the significant sum from NAC
21 to Robinson and R. Herman was intended to hinder, delay, and defraud creditors including
22 Plaintiff; was made without NAC receiving a reasonably equivalent value in exchange for the
23 transfer; that the remaining assets of NAC, after such transfer(s), were unreasonably small in
24 relation to the business and/or transactions, it was engaged in or committed to, and was made to
25 “insiders”; that the transfers to Robinson and R. Herman were concealed, hidden, surreptitious
26 and not disclosed; the transfers made contemporaneously with Plaintiff's threat of suit; that
27
28

1 NAC removed and concealed its assets; that NAC was insolvent or became insolvent as a result
2 of and shortly after the transfers were made to Robinson and R. Herman and that the transfers
3 occurred shortly before or after a substantial debt to asset lender, AloStar Commerce Bank was
4 incurred.
5

6 33. Defendants, and each of their participation in the fraudulent transfer described in
7 this cause of action was wrongful, unlawful and was intended to damage, injure and violate the
8 rights of Plaintiff.
9

10 34. Defendants, and each of their conduct was willful, fraudulent, wrongful,
11 malicious, vexatious, and in violation of the civilized norms of society, therefore justifying the
12 imposition of punitive and exemplary damages.
13

14 35. By virtue of the fraudulent transfer alleged in this cause of action, Defendants and
15 each of them, are legally required to disgorge the total value of the transfers made to Defendants
16 Robinson and R. Herman and each of them return such funds to NAC, for disbursement to
17 Plaintiff in partial satisfaction of the monies owed to him pursuant to the Retirement Agreement.
18

19 **FIFTH CAUSE OF ACTION**

20 FRAUD

21 36. Plaintiff incorporates by reference each and every allegation contained in
22 Paragraphs 1 through 35 as though fully set forth herein.
23

24 37. Plaintiff is informed and believes that Defendants Robinson and R. Herman were
25 aware of NAC's financial condition at the time the payment of approximately \$2,000,000 was
26 paid to them collectively and were further aware that by distribution of those sums to each such
27
28

1 Defendant, NAC would be rendered incapable of satisfying its obligations pursuant to Plaintiff's
2 Retirement Agreement.

3 38. Being aware of the restriction of the use of NAC funds by AloStar Commerce
4 Bank, said Defendants distributed to themselves and to the exclusion of trade and contract
5 creditors a sum in excess of \$2,000,000 thereby rendering NAC insolvent and unable to meet its
6 obligations in a timely manner.
7

8 39. Defendants Robinson and R. Herman therefore hold the sums paid to and
9 possessed by them as creditors of NAC for the benefit of Plaintiff.
10

11 **SIXTH CAUSE OF ACTION**

12 UNJUST ENRICHMENT
13

14 40. Plaintiff incorporates by reference each and every allegation contained in
15 Paragraphs 1 through 39 as though fully set forth herein.
16

17 41. Plaintiff is informed and believes that by virtue of the circumstances of Defendants
18 Robinson and R. Herman's ascension to funds exceeding \$2,000,000 from NAC, they, and of
19 them, hold those monies as involuntary trustees for the benefit of NAC's creditors for
20 specifically the benefits under the Retirement Agreement owed Plaintiff.
21

22 **SEVENTH CAUSE OF ACTION**

23 CONSTRUCTIVE TRUST
24

25 42. Plaintiff incorporates by reference each and every allegation contained in
26 Paragraphs 1 through 40 as though fully set forth herein.
27

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c. That the Retirement Agreement's restriction on Michael's defeasance is unenforceable and of no force or effect due, *inter alia*, to a failure of consideration;

e. That the purported restriction of the Retirement Agreement specified in Section 1.19 against assignment of the Agreement and as otherwise contained therein, be found of no further force or effect.

52. The relief sought by Plaintiff will substantially resolve the controversy relative to the respective interests of Plaintiff and Defendants.

JURY DEMAND

- 11 -
SECOND AMENDED COMPLAINT

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendant, and each of them, for the following:

1. compensatory damages for the sum of no less than \$13,887,000 in accordance with proof at trial;
2. special damages in accordance with proof at trial;
3. for general damages in accordance with proof;
4. a declaration of the rights and responsibilities of Plaintiff and Defendants be rendered by this Court adjudging and granting relief to Plaintiff;
5. reasonable attorney's fees pursuant to California Civil Code § 1717;
6. prejudgment interest on all sums found due;
7. costs and expenses of suit herein incurred; and
8. such other and further relief as the Court deems just and appropriate.

DATED: October 16, 2017

HOLTHAUS APC

By: /s/ Douglas D. Holthaus
Douglas D. Holthaus, Esq.
Attorneys for Plaintiff
MICHAEL HERMAN